Nos. 110-112.

In the Supreme Court of the United States

OCTOBER TERM 1939.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
MARY Q. HALLOCK and CENTRAL UNITED NATIONAL BANK OF CLEVELAND, Trustees,
Respondents.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
MARY Q. HALLOCK, EXECUTRIX, Estate of Henry Hallock, deceased,
Respondent.

GUY T. HELVERING, Commissioner of Internal Revenue,
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vs.
S. H. SQUIRE, Superintendent of Banks of the State of Ohio in Charge of Liquidation of The Union Trust Company, Successor of The First Trust and Savings Company, Trustee, Cleveland, Ohio,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

NATURE OF CASES.

These cases, which for practical purposes may be considered as one, involve the question of the taxability, under Section 302(c) of the Revenue Act of 1926 as amended, of

the remainder interest[1] in an alimony trust created by Henry Hallock on September 3, 1919.

The cases originated by appeals to the Board of Tax Appeals from deficiency estate tax assessments. The Commissioner had levied the assessment not only against Mary Q. Hallock, the Executrix, Case No. 111, but also against the Trustees of an insurance trust as transferees, Case No. 110, and against the trustee of the alimony trust as transferee, Case No. 112 (R. 13, 7, 19).

The basic legal question is fully presented in case No. 111, in which the Executrix is Respondent and no separate discussion of the other two cases is necessary.

The Board of Tax Appeals determined that no tax was due and accordingly set the deficiencies aside (R. 37, 46-47). Upon petition for review the Circuit Court of Appeals affirmed. Petitions for writs of certiorari filed by the Commissioner were granted on October 9, 1939.

OPINIONS IN CASE.

The opinion of the Board of Tax Appeals (R. 37) is reported in 34 B. T. A. 575. The opinion of the Circuit Court of Appeals (R. 70) is reported in 102 F. (2d) 1. Both decisions were unanimous.

QUESTION PRESENTED.

The sole question presented[2] is whether the remainder interest (or some lesser interest) in the alimony trust,

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[1] In the Circuit Court of Appeals the Commissioner abandoned the claim, earlier asserted, that the life interest created by the trust was to be included in the gross estate.

[2] Both before the Board of Tax Appeals and in his brief in the Circuit Court of Appeals the petitioner also claimed that the Executrix was not entitled to deduct certain indebtedness of the decedent in excess of the appraised value of the probated assets of the estate. This assertion is now abandoned.

similar in all essential respects to the trusts involved in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, should now be held taxable as part of the grantor's gross estate under Section 302(c) merely because of the existence of a possibility of reverter such as existed in those cases.

STATEMENT OF CASE.

The facts, as stipulated and as found by the Board of Tax Appeals (R. 28 *et seq.*, 37 *et seq.*), are as follows:

Henry Hallock died testate on October 10, 1932, a resident of Cleveland, Ohio. His widow, Mary Q. Hallock, was appointed Executrix of his estate by the appropriate probate court.

On September 3, 1919, decedent entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500.00 per month as alimony and for the creation of a trust to produce and secure this sum (Ex. B to Stipulation, R. 33-35). On the same day he created a trust of 884 shares of 7% preferred stock of The Ohio Rubber Company, of which trust the Superintent of Banks of Ohio had become trustee at the grantor's death as successor to the original trustee (Ex. A to Stipulation, R. 30-33). The total preferred dividend called for by the stock amounts to $6,188.00 annually, which would be sufficient to meet the payment of $6,000.00 per year to the wife and leave $188.00 per year for the expenses and compensation of the Trustee (R. 29, 39). The trust agreement provided that the net income of the trust, not exceeding $6,000.00 per annum, should be paid to Anne Lamson Hallock for life and that when she should die the trust should terminate and the fund be delivered to the settlor Henry Hallock if then living, but that if he should not then be living, the fund should be paid and delivered to the children of Henry and Anne Lamson Hallock. The trust was subject

to termination or alteration only by the written consent of the settlor and the life beneficiary. Clause "C" of the trust instrument, making provision as aforestated, is shown below.[1]

Anne Lamson Hallock secured the contemplated divorce in October of 1919 (R. 42). She was sixty-three years old on the date of decedent's death (R. 42), is still living, has not remarried and the trust is still in effect (R. 42, 54).

SUMMARY OF ARGUMENT.

I.

(a) The instant cases are controlled by *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48, and not by *Klein v. United States*, 283 U. S. 231. The *St. Louis Trust Company* cases are sound. Those cases differentiate, for estate tax purposes, between, on the one hand, property rights possessed or enjoyed by a decedent during life and passing at his death, and, on the other hand, mere possibilities of possession or enjoyment which may never occur and are in no aspect subject to the grantor's control. This

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[1] "C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

distinction is well founded in the law and even when applied to the practical subject of federal taxation is in no sense an impractical refinement.

(b) The *St. Louis Trust Company* cases do not conflict with the *Klein* case. Klein kept the reversion vested in himself, and gave his wife only a conditional estate, subject to the condition precedent that he should predecease her. His death accomplished a transfer by immediately vesting the entire property in her, in possession and enjoyment. The transfer was in effect as testamentary as if the grantor had made it by will.

In each *St. Louis Trust Company* case the grantor retained no reversion, but only a contingent reversionary interest—a possibility of reverter over which he had no control—the destruction of which by the death of the grantor did not effect the transfer of property to the remainderman. The remainders were vested subject only to defeasance by the happening of a condition subsequent. The transfers were complete when made and in no aspect were substitutes for testamentary disposition.

It is unsound to say that these are differences only in terminology or that they have no substantial practical consequences or that they mean that taxability is made to turn upon the ingenuity of the conveyancer. In only a limited sense does a grantor have a choice between a form of conveyance which creates a taxable result and one which does not. If he chooses the latter he must create property interests of entirely different character than if he chooses the former and, as a result of such choice, must relinquish the possession of his property and all rights of ownership.

II.

(a) All decisions of this Court and the prior decisions of other courts and the Board of Tax Appeals in cases

where there was a possibility of reverter accord with the decisions in the *St. Louis Trust Company* cases.

(b) To overrule the *St. Louis Trust Company* cases would mean to disapprove the settled doctrines of the other decisions of this Court interpreting Section 302 (c) and the abandonment of the present conception of the statute. Such decisions include *Shukert v. Allen*, 273 U. S. 545; *Reinecke v. Northern Trust Company*, 278 U. S. 339; *May v. Heiner*, 281 U. S. 238; *Burnet v. Northern Trust Company*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783 and *McCormick v. Burnet*, 283 U. S. 784, in all of which the deaths of the grantors terminated reserved rights or interests of far more consequence than a possibility of reverter.

Petitioner's argument that even if nothing passed from the grantor at his death, the transfer should be regarded as testamentary and hence taxable if death in any manner affects the character or quality of the rights of any beneficiary, is not supported by reason and is contrary to the tests of taxability established by the foregoing and all other decisions of this Court.

(c) The circumstance that the obliteration of a possibility of reverter may effect a limited change in the character or quality of a remainder might well be a factor for consideration if the constitutionality of a statute appropriately worded to tax the transfer were challenged. But in a case of statutory interpretation the taxpayer is entitled to have the meaning of the statute determined with regard to the legal nature of the interests created and the mere fact that the death of the grantor may cause some technical or unsubstantial change in the nature of the remainder does not warrant the holding of the transfer to be testamentary within the intendment of Section 302 (c). This proposition finds implied support in all constitutional cases decided by

this Court in which the statutory phrase was involved, when considered in connection with the cases which merely interpret the statute.

III.

A possibility of reverter is not such a property interest that its obliteration by the death of the grantor effects that transfer of property or of economic benefits which is the subject of the estate tax. The termination of a possibility of reverter by the death of the grantor differs from the similar termination of a power of revocation or to designate beneficiaries. A possibility of reverter is entirely beyond the control of the grantor and is not an incident of ownership in the property. It is but an expectancy, the extinguishment of which transfers no interest in property to any one.

IV.

The Congressional and administrative action since the *St. Louis Trust Company* decisions demonstrates that Congress does not desire that transfers subject to possibilities of reverter be taxed as testamentary. *White v. Poor*, 296 U. S. 98, which was decided on the same day as the *St. Louis Trust Company* cases held that the transfer there involved was not taxable under Section 302 (d) of the Revenue Act of 1926. By the Revenue Act of 1936 Congress immediately changed this result by prospectively amending Section 302 (d). This alone shows acquiescence by Congress in the interpretation of Section 302 (c) by the *St. Louis Trust Company* decisions. Furthermore, Section 302 (c) was not amended by the Revenue Acts of 1937, 1938 and 1939, although the 1937 act was passed for the expressed purpose of preventing tax avoidance.

Whenever Congress has disagreed with the result of decisions interpreting Section 302 (c), amendments have promptly followed, as illustrated by the almost instant amendment of the section to avoid the result of cases holding the section inapplicable to irrevocable transfers where the grantor had retained a life interest in the income.

In 1937, Article 17 of Treasury Regulations 80 was amended to conform to the *St. Louis Trust Company* decisions. On February 10, 1939, while the amended regulation was in effect, all of the internal revenue laws were codified and Section 302 (c) was reenacted as Section 811 (c). Thus it is to be presumed that the construction is satisfactory to Congress and that the reenactment of the statute carries such construction with it. The disapproval of the *St. Louis Trust Company* cases would therefore be contrary to the actual intention which must now be ascribed to Congress.

Transfers like those in the *St. Louis Trust Company* cases, where a grantor parts with all control over his property, ought to be subject to the gift tax. The gift tax law, however, does not contemplate two taxes upon gifts not made in contemplation of death. *Sanford v. Commissioner*, Docket No. 34 at this term.

V.

Assuming that the doctrine of *St. Louis Trust Company* cases should no longer be approved by the Court, the doctrine of *stare decisis* as developed by this Court strongly indicates that those cases should not be overruled. The problem calls for the exercise of judicial discretion and many factors should be taken into account.

Granting the desirability of a flexible approach unfettered by earlier determinations where constitutional

questions are involved, nevertheless a more rigid application of the doctrine of *stare decisis* is called for in cases of statutory interpretation. In the latter situation Congress may correct any result regarded by it as disadvantageous. Petitioner's argument that the allegedly wrong result of the *St. Louis Trust Company* cases cannot be met by Congressional action is without merit. Congress could, if it desired, accomplish taxability in many ways.

Another factor is the widespread reliance upon the principles heretofore laid down by this Court. Not only have business affairs been conducted in the light of those principles, but this Court's decisions have been followed extensively by inferior courts and by the Board of Tax Appeals.

Other cogent factors arguing in favor of a rigid application of *stare decisis* are the Congressional action and inaction following those decisions considered in the light of a known Congressional willingness to amend when it believes a decision by this Court to result disadvantageously to the public revenues; and the codification of the revenue laws following the amendment to the Commissioner's regulations. See Section IV immediately *ante*.

Similarly, in considering whether to exercise its discretion in favor of an adherence to the *St. Louis Trust Company* cases the Court is entitled to take into account the rule that substantial doubts are to be resolved in favor of the taxpayer. This rule is frequently applied where there has been no authoritative decision by this Court and should all the more be applied where this Court has spoken and is being urged to change its view rather than await Congressional action.

ARGUMENT.

I.

THESE CASES ARE GOVERNED BY HELVERING v. ST. LOUIS UNION TRUST COMPANY AND BECKER v. ST. LOUIS UNION TRUST COMPANY. THOSE DECISIONS ARE SOUND AND DO NOT CONFLICT WITH KLEIN v. UNITED STATES.

Petitioner contends in his brief, as he did in the Circuit Court of Appeals, that the Hallock Trust is distinguishable from those in the *St. Louis Trust Company* cases and that the case at bar is controlled by *Klein v. United States*, 283 U. S. 231. In the second part of his brief he urges that in any event the *St. Louis Trust Company* cases conflict with the *Klein* case and should be overruled. It is our contention that not only is there no valid distinction between the Hallock Trust and the *St. Louis Trust Company* cases, but that the decisions in those cases are sound and do not conflict with the *Klein* case.

(a) It is submitted that the *St. Louis Trust Company* cases are eminently sound in principle and, as will hereafter be shown, are in accord with and required by the earlier fundamental determinations of this Court.

In effect the *St. Louis Trust Company* cases decide that the statute was intended to levy a tax on true property rights possessed or enjoyed by decedent during life and passing to others at his death, but that it does not tax mere possibilities which are not accompanied with a present right of possession or enjoyment and which are in no aspect subject to the grantor's control. The distinction between true property interests and mere possibilities is real and is in no sense an impractical refinement.

In *Helvering v. St. Louis Union Trust Company* decedent had created a trust the net income of which was to be paid to his daughter during her life, with remainder over to named persons. The trustee was given discretionary

power to terminate the trust, upon the exercise of which the estate was to revert to the grantor. The indenture further provided that if grantor's daughter should predecease him the trust should terminate and the trust estate be delivered to the grantor to be his absolutely. In its essence the latter provision is identical with the Hallock trust. In that trust Mrs. Hallock, about to secure a divorce, was the life tenant, with remainder over to her children. Similarly, if the life tenant, Mrs. Hallock, should predecease Mr. Hallock the trust was to terminate and the trust estate was to become Mr. Hallock's absolutely. The parallel in legal principle is clear.

Except for the fact that there were no remainders to third persons, the trust involved in *Becker v. St. Louis Union Trust Company* is not only identical in legal effect with the Hallock Trust, but strikingly similar in phraseology. In that case the grantor declared that he held certain property in trust for a named person. The trust agreements then provided (296 U. S. p. 50):

> "(a) If said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

The principal basis of the distinction attempted is the claim that the remainders of the Hallock children are contingent remainders which would vest only upon the happening of a condition precedent and therefore the grantor retained a vested reversion, subject to being divested by the happening of a condition subsequent. Granting these premises, the distinction would be established, for it is true that in the *St. Louis Trust Company* cases the grantor "left in himself no power to resume ownership, possession

or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned." (*Helvering v. St. Louis Union Trust Company* at p. 43 of 296 U. S.) It is only necessary, however, to set the language of Clause "C" of the Hallock Trust opposite the above quoted provisions from the trust agreement in *Becker v. St. Louis Union Trust Company* to see that there is no distinction either in substance or in form.

(b) Although part of petitioner's brief purports to be directed to the proposition that the *St. Louis Trust Company* cases and the instant case are distinguishable, his principal argument is that those cases are in conflict with *Klein v. United States*, 283 U. S. 231. It is submitted that the distinction between the cases is fundamental.

The *Klein* case was examined in *Helvering v. St. Louis Union Trust Company* and was thus distinguished in the opinion of the Court, at page 45 of 296 U. S.:

> "The case of *Klein v. United States*, 283 U. S. 231, which is strongly relied upon by the Government, does not support its position. There the grantor, 15 months prior to his wife's death, conveyed to his wife by deed a life estate in certain lands. But in the event that she survived the grantor 'and in that case only' she was to take the lands in fee simple. The effect of this deed, we held, was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee. But here the grantor parted with the title and all beneficial interest in the property, retaining no right with respect to it which would pass to anyone as a result of his death. Unlike the *Klein* case, where the death was the generating

source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it."

The Government's argument is that despite the distinction so made by this Court, the trusts in the *St. Louis Trust Company* cases were, as was the conveyance in the *Klein* case, substitutes for testamentary disposition within the intendment of the statute.

The difference between the *Klein* and the *St. Louis Trust Company* cases is obvious and can readily be seen without resort to fine distinctions of real property law with reference to the nature of the estates created. But if it is necessary to consider this difference legalistically, it is submitted that from this approach also it is fundamental.

The most simple and practical distinction is whether the grantor, as in the *Klein* case, retained until his death the ownership, or a substantial incident of ownership, of his property, which passed to another as a result of his death or whether, as in the *St. Louis Trust Company* cases, he completely divested himself of control, possession or enjoyment, reserving the mere, and at times remote, possibility of resuming those incidents of ownership upon the happening of some event over which he had no legal or practical control, which possibility passed to no one as a result of his death.

Klein was completely unwilling to give up the possession, control or enjoyment of his property. After the grant of the life estate, his deed merely said in effect—"if my wife shall survive me, I give her my property in fee simple." The advantages of the fee simple title so retained remained in Klein as well as the burdens which accompany those advantages. His deed gave to his wife nothing but a fee simple estate upon a condition and

effectively postponed the date of the passing of his property to her until his death by keeping the reversion vested in himself and providing that it should pass to his wife, not presently, but if she should survive him "*and in that case only.*" His death did far more than to effect a mere technical change in the nature of his wife's contingent remainder. It caused the immediate vesting of the entire property in her in present possession and enjoyment. It was, in effect, more than a *substitute* for testamentary disposition; it was virtually as much of a testamentary disposition as if he had given his reversion to his wife by will.

If the problem is dealt with by considering the legal nature of the estates or interests created, the answer is the same. By his deed Klein retained a vested reversion in his property and gave to his wife at most a contingent remainder, which vested not only in interest but also in possession at his death. In the Hallock trust and those involved in the *St. Louis Trust Company* cases the grantors had no reversion, but only an interest of far less legal and actual consequence—a possibility of reverter; while the interests of the remaindermen which were created by the trust instruments were vested subject to divestiture by the happening of a condition subsequent. The death of the grantor made the remainders indefeasible by putting an end to the condition subsequent, but did not transmute a conditional estate into one vested in possession as it did in the *Klein* case. Neither the possibility of reverter nor any real incident of ownership of property passed to anyone. See Mr. Justice Roberts' dissenting opinion in *Coolidge v. Long,* 282 U. S. 582 at p. 629, referring to *Reinecke v. Northern Trust Company,* 278 U. S. 339:

"Repeatedly throughout the opinion the passage of the control, possession and enjoyment of the property is referred to as the touchstone of the incidence of the tax."

The Government contends that the interest retained by Mr. Hallock was far more substantial than "a mere possibility of reverter." If this be true as to the Hallock trust, so is it as to those of which the St. Louis Union Trust Company was trustee. A question is raised in the Government's brief as to what the Court meant by the term "possibility of reverter" in the *St. Louis Trust Company* cases. It does not appear that this doubt existed in either the majority or the dissenting opinions in those cases. The term is defined in the *Restatement of the Law of Property—Future Interests* (Parts 1 and 2) at page 525, as—"any reversionary interest which is subject to a condition precedent," and it is clear from the *Restatement* that it may be an interest in either real or personal property. See also Section 157 of the *Restatement of the Law of Property*, particularly pages 541, 542, 557 and 558, where are stated principles of the classification of remainders, from which it appears clearly that the remainders in the instant case and the *St. Louis Trust Company* cases were vested subject to defeasance upon the happening of a condition subsequent.

It is claimed that the difference between the *Klein* and *St. Louis Trust Company* cases is only the difference between a vested remainder subject to being divested and a contingent remainder and that this is a difference primarily in terminology which has no substantial practical consequences. As a corollary it is stated that Congress could not have intended tax consequences to turn upon the ingenuity of the conveyancer who is free to draft an instrument either way without affecting the quality of the estates being created.

The truth of this as to Congressional intent may be conceded, as may also the general proposition that "in determining whether a taxable transfer becomes complete only at death we look to substance, not to form." (See dissenting opinion in *Helvering v. St. Louis Union Trust Company*, p. 47 of 296 U. S.) It is also true that the question of the nature of estates created by a conveyance, whether they are vested or contingent, may sometimes turn upon the form or order of language employed.[1]

But it does not follow that the question whether the transfer is taxable can ever, in any proper sense, be said to depend upon the conveyancer's choice of language. The ultimate test is whether the conveyance operates as a transfer intended to take effect at death or is a substitute for testamentary disposition. Whether it so operates may, at times, turn upon whether the remainders it creates are vested or contingent. And, of course, there is a choice in the use of a form of language which in one case will create a vested remainder and in the other a contingent one. But if the grantor directs the draftsman to exercise his choice in such a way as to create estates of a character which make the transfer non-taxable, the grantor must pay for it in some other way, for example, by giving up any substantial rights in his property.

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[1] *Gray on the Rule against Perpetuities*, at Section 108: "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A. for life, remainder to his children, but if any child dies in the lifetime of A. his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent."

This may be illustrated by the example on page 19 of the Government's brief. It is there suggested that in the *Klein* case the conveyance might just as easily have been phrased—"to my wife in fee, but if she dies before I do, then to me." So it might, but it is submitted that the further statement that such a change would create interests that are identical in quality with those actually present in the *Klein* case is incorrect. For under the supposed form of conveyance the grantor parts with the real incidents of ownership of his property. All advantages of ownership, such as the right to rents, the right of action for waste or the right to proceeds of condemnation, would be in the grantee, while if the conveyance takes the general form of the language which was actually used in the *Klein* case, these important incidents of ownership, as well as many others, are retained by the grantor and they pass to the grantee upon his death.[1]

In a case of statutory interpretation it is not to be presumed that Congress did not intend its language to be construed with the aid of established principles of law governing the nature or quality of future interests. Even if these principles may be called technical, they are not merely formal. Only by referring to them may substantial ultimate questions be determined. Moreover, the reality of the distinction between contingent and vested interests is not destroyed by alluding to it as archaic or by pointing to its feudal origin. Many important substantive legal principles are rooted in the past but now have a content applicable to present day conditions.

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[1] See *Tiffany on Real Property*, 2nd Ed., Vol. I, Sec. 93, p. 336; *Thompson on Real Property*, Vol. III, Sec. 2112, p. 176.

II.

THE DOCTRINE THAT TRANSFERS LIKE THOSE IN THE ST. LOUIS TRUST COMPANY CASES ARE NOT TESTAMENTARY AS A MATTER OF STATUTORY INTERPRETATION ACCORDS WITH THE PRINCIPLES SETTLED BY ALL OTHER DECISIONS OF THIS COURT.

(a) All decisions of this Court and the prior decisions of other courts and the Board of Tax Appeals in cases where there was a possibility of reverter accord with the decisions in the St. Louis Trust Company cases.

The first similar case to reach this Court was *McCormick v. Burnet*, 283 U. S. 784. In that case, in addition to a retained life interest in the income, there was a possibility of reverter of the principal to the grantor in case she should survive the other beneficiaries. The Board of Tax Appeals held the trust not subject to the estate tax.[1] While the case was pending in the Circuit Court of Appeals, *May v. Heiner*, 281 U. S. 238, was decided. The Circuit Court of Appeals regarded the case as controlled by *May v. Heiner* so far as the grantor's life estate was concerned, but nevertheless reversed the decision of the Board in a rather vague opinion holding that the existence of the possibility of reverter was one factor showing that the transfer was intended to take effect in possession or enjoyment at or after the grantor's death.[2]

According to the record, *McCormick v. Burnet* was advanced on the docket of this Court for argument after the *Klein* case, upon motion by the Government, which stated that both cases involved a related question. The decision

[1] 13 B. T. A. 423.

[2] 43 Fed. (2) 277.

of the Circuit Court of Appeals was reversed *per curiam* on the authority of *May v. Heiner.* Although nothing was said in the opinion about the question now under consideration, it seems clear that it must have been considered and that the *Klein* case was regarded as inapplicable. Petitioner's brief, pages 21 and 22, argues that the effect of the possibility of reverter in the *McCormick* case was not passed upon. Although petitioner states that the *McCormick* case was argued upon the same day as the *Klein* case, he does not comment upon the important fact that this came about at the Government's instance and through its representation that it involved questions akin to those involved in the *Klein* case. This fact, plus the fact that the lower court's opinion turned upon the effect of the possibility of reverter shows clearly that the issue was before the Court and clearly presented to it and must, therefore, be taken to have been decided. As is pointed out in *Bingham v. United States*, 296 U. S. 211, matters pertinent to an issue before the Court, shown by the record and which were clearly presented to the Court, are to be taken as covered by the decision though not mentioned in the opinion.

Although the question might have been regarded as decided by the *McCormick* case, it soon arose again in *Helvering v. Duke*, 290 U. S. 591, in which the decisions of the Board of Tax Appeals and the Circuit Court of Appeals holding the transfer not taxable under Section 302 (c) were affirmed by an equally divided court.

About a month after the *St. Louis Trust Company* decisions they were followed in *Bingham v. United States*, 296 U. S. 211, and *Industrial Trust Co. v. United States*, 296 U. S. 220, which held that insurance policies taken out by decedents on their own lives prior to the passage of the estate tax law and irrevocably payable to the beneficiaries,

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directly or by assignment, were not subject to the estate tax, despite provisions that if the beneficiaries did not survive the decedents, the proceeds would go to the estates of the decedents. The opinion of the Court in *Bingham v. United States*, said that the *St. Louis Trust Company* cases had established the principle that the title and possession of the beneficiaries were fixed by the terms of the policies and assignments, beyond the power of the insured to affect; that no interest passed to the beneficiaries as the result of the death of the insured, which death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

One of the transfers held non-taxable in *Hassett v. Welch*, 303 U. S. 303, on the ground that the amendment to Section 302(c) by the Joint Resolution of March 3, 1931, does not operate retroactively, provided that the property would revert to the grantor should she survive her son. Apparently the Government did not see fit to raise the contentions made in the case at bar and it seems that the *St. Louis Trust Company* cases were tacitly assumed to be controlling. Had the Court been of the opinion that the possibility of reverter rendered the transfer taxable as one to take effect in possession or enjoyment at death, i.e, that the *St. Louis Trust Company* cases were incorrectly decided, the decision would have been favorable to the Government despite the Court's holding that the joint resolution could not operate retroactively.

Prior to the *St. Louis Trust Company* decisions the question whether the retention of a possibility of reverter makes an *inter vivos* transfer, otherwise absolute, one intended to take effect at or after the death of the grantor, had been before the Board of Tax Appeals and the Federal Courts frequently and substantially all of these decisions

were in favor of the taxpayer.[1] (For decisions of the Federal Courts and the Board following the *St. Louis Trust Company* cases, see pp. 46 and 47, *infra.*).

Petitioner's brief, at pages 25 and 26, cites certain state court decisions, particularly *In Re Lowengart's Estate*, 160 Ore. 118. Even were the case at bar one of first impression, the cited cases could not be regarded as persuasive, because of the difference between a transfer tax and a succession tax, alluded to by petitioner. That this difference was regarded by the court in the *Lowengart* case as creating a controlling distinction from the *St. Louis Trust Company* cases is shown by the following language from the opinion:

> "Notwithstanding some language in the opinion in the *Helvering* case from which a different implication might be drawn, we think that the attempt to attach controlling significance to that decision here rests upon the failure to give due weight to the distinction between a tax on the transfer, such as the federal estate tax, and a tax on the succession, such as the Oregon inheritance tax." (Citing *Reinecke v. Northern Trust Company* and dissenting opinion in *Coolidge v. Long, supra.*)

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[1] *McCormick v. Commissioner*, 13 B. T. A. 423; (reversed 43 F. (2d) 277; Circuit Court of Appeals reversed 283 U. S. 784);
Duke v. Commissioner, 23 B. T. A. 1104 (affirmed 62 F. (2d) 1057 and by equally divided court, 290 U. S. 591);
Peabody v. Commissioner, 24 B. T. A. 787;
Taylor v. Commissioner, 27 B. T. A. 220;
Wallace v. Commissioner, 27 B. T. A. 902 (affirmed without opinion, 71 F. (2d) 1002; certiorari denied, 293 U. S. 600);
Bonney v. Commissioner, 29 B. T. A. 45;
Nichols v. Bradley, 27 F. (2d) 47;
Tait v. Safe Deposit & Trust Co., 74 F. (2d) 851;
Amoskeag Trust Co. v. Field, 10 Fed. Sup. 635;
Wheeler v. Commissioner, 20 B. T. A. 695;
Dunham v. Commissioner, 26 B. T. A. 286.

When a state court, however, holds a transfer subject to a possibility of reverter not to be one intended to take effect at death under a succession tax law, this very difference between a transfer tax and a succession tax lends great strength to such a decision. It was so held in *Matter of Barstow*, 230 App. Div. (N. Y.) 371; 244 N. Y. S. 588; affirmed 256 N. Y. 647. This case is particularly noticed in the opinion of the court in *Helvering v. St. Louis Union Trust Company*, and no further comment is made upon it, except to quote the following from the opinion:

> "As stated by Chief Justice Cardozo in the *Schmidlapp* case, *supra*: 'In *Matter of Craig* (97 App. Div. 289, 89 N. Y. S. 971, affirmed 181 N. Y. 551, 74 N. E. 1116) the remainder was contingent, but the contingency was not dependent on the will of the donor, and the right as against him was already perfect and complete.' "

(b) The basic principles of the other decisions of this Court interpreting Section 302(c) support the St. Louis Trust Company decisions, and the overruling of the latter would mean the disapproval of the settled doctrines of those other decisions.

All of the other decisions of this Court which interpret the statutory phrase "intended to take effect in possession or enjoyment at or after his death," support the principle of the *St. Louis Trust Company* cases, some of them, we submit, to such an extent that if those cases were overruled, this would virtually amount to the disapproval of the accepted and well-founded doctrines of these other cases, and the complete overturn of present conceptions of the statute.

In general these cases all rest upon the concept that what is taxed by the estate tax law is the transmission of or power to transmit property from the dead to the living;

that death is the generating source from which the taxing power takes its being, and that in order to sustain the tax the death must have brought about the completion of the shifting of the economic benefits of property which is the real subject of the tax. *Heiner v. Donnan*, 285 U. S. 312; *Chase National Bank v. United States*, 278 U. S. 327; *Knowlton v. Moore*, 178 U. S. 41.

The earliest case involving solely the interpretation of the words "intended to take effect in possession or enjoyment at or after his death" is *Shukert v. Allen*, 273 U. S. 545, in which the effect of Section 402 (c) of the Revenue Act of 1918 was under consideration. It was there held that a conveyance of securities made before the decedent's death in trust to accumulate the income until a distant date specified and then to divide the fund among his children, vested the interests of the children when executed and did not fall within the statutory language. The Court said that the transfer was immediate and out and out, leaving no interest remaining in the grantor, and that the interests of the children were vested as soon as the instrument was executed, even though those interests might have been divested as to any one of them in favor of his issue, if any, or of the surviving beneficiaries, if he died before the termination of the trust.

The effect of the statutory language next came before the Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339. Two of the seven trusts in that case were revocable by the settlor alone and were held subject to the estate tax upon the grounds set forth in *Chase National Bank v. United States*, 278 U. S. 327, decided on the same date. In the other five trusts there was no power of revocation in the settlor acting alone, but life interests in the income were created in beneficiaries other than the settlor, terminable, as to one trust, five years after the settlor's death or upon the death of the designated beneficiary, should

she survive that date, and as to the other four trusts, five years after the settlor's death or on the death of the respective life tenants, whichever should first happen. In all five trusts there were remainders over upon the deaths of the life beneficiaries. The opinion of the Court, after citing *Shukert v. Allen, supra,* goes on to say, at page 347:

> "There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstances that the possession or enjoyment passed as indicated.
>
> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A. v. Davis,* 264 U. S. 47, 50; *Edwards v. Slocum,* 264 U. S. 61, 62; *N. Y. Trust Co. v. Eisner,* 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

Clearly the time when the remaindermen in that case would come into actual possession or enjoyment of the trust properties was directly dependent upon the death of

the grantor and in that sense the transfer of the remainders might have been said to be testamentary or intended to take effect in possession or enjoyment at or after death. But the remainders were vested by the trust instruments and nothing passed from the possession, enjoyment or control of the settlor at his death. The case, therefore, very importantly limits the scope of the statute.

The next interpretative decision is *May v. Heiner*, 281 U. S. 238. There the decedent had made a transfer in trust, under which the income was payable to her husband during his lifetime and after his death to the decedent during her lifetime, with remainder over to her children. Reversing the lower courts, the Court held that the trust was not subject to the estate tax as a transfer intended to take effect in possession or enjoyment at or after death. The Court said at page 243:

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

The Court went on to quote from that part of the opinion in *Reinecke v. Northern Trust Company, supra*, which indicates that the statute only reaches trusts or interests passing from the possession, enjoyment or control of the donor at his death and that any doubts about the matter must be resolved in favor of the taxpayer.

It was argued for the Government in *May v. Heiner* that the decedent's death terminated her life estate and that the termination of this right to receive the trust income for life if she should survive her husband, which freed the re-

mainder of the possibility of its exercise, was a transfer within the meaning of the statute. No real difference with respect to the question being discussed can be seen between the right or interest retained by the grantor in *May v. Heiner* and the possibilities of reverter in the *St. Louis Trust Company* cases. In the former case the grantor's death obliterated her life estate; in the latter two cases the deaths of the grantors obliterated their contingent reversionary interests—the possibilities of reverter.

Although *May v. Heiner* was but a logical application of the principles of *Shukert v. Allen* and *Reinecke v. Northern Trust Company,* its full implications were not everywhere perceived until the decisions in *Burnet v. Northern Trust Company,* 283 U. S. 782;[1] *Morsman v. Burnet,* 283 U. S. 783;[2] and *McCormick v. Burnet,* 283 U. S. 784.[3]

These cases all involved trusts where the decedent grantors had retained life income interests or estates, with remainders over. By *per curiam* decisions the trusts were all held not to be subject to the estate tax upon the authority of *May v. Heiner, supra.*

In each of these three cases the death of the grantor had far greater practical consequences than the obliteration of mere contingent interests or possibilities of reverter; death terminated the grantor's life estate, which was vested in possession and enjoyment. Viewing the right to the income from property as equivalent to the possession of the property itself, each grantor enjoyed his property until his death and that event transferred the enjoyment of it to others.

At page 30 of his brief petitioner states that, wholly apart from the shifting of economic benefits at death, the remainder in the Hallock trust is taxable because it was a

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[1] Reported below, 41 F. (2d) 732.
[2] Reported below, 44 F. (2d) 902.
[3] Reported below, 43 F. (2d) 277.

substitute for a testamentary disposition and was "literally" intended to take effect in possession or enjoyment at or after death. The argument seems to be that although nothing passes at the grantor's death, nevertheless if that death in any manner affects the coming into possession or enjoyment of the property, it is taxable. Stated another way, it is that no matter how complete the transfer when made and even though nothing passes from the grantor at his death, if that death marks the time at which possession or enjoyment of some part of the transfer commences or in any other manner affects the character, quality or existence of a beneficiary's rights, the transfer is taxable. This must be based upon the broad premise that since testamentary dispositions speak as of the date of death, anything which a grantor does which affects rights at or after his death is necessarily a substitute for a testamentary disposition.

To support this novel view, the Court's attention is called to the fact that Congress has included in the gross estate gifts in contemplation of death (petitioner's brief, p. 30) and has taxed income to a grantor who has nothing more than the power to control that income (petitioner's brief, p. 31). But the fact that Congress may constitutionally prevent avoidance of taxes by making a gift in contemplation of death the legal equivalent of a testamentary disposition and by making control over income in certain circumstances the equivalent of the receipt of the income does not warrant the conclusion that where Congress is not attempting so to do but is merely taxing a defined type of transfer, i.e. one to take effect at or after death, the statute by which this is done must be interpreted to include transfers in which there is no shifting of economic benefits at death.

In the case of gifts in contemplation of death, we are dealing with substitutes for property passing at death. In

the case of gifts to take effect at or after death under Section 302(c), we are dealing not with substitutes for property passing at death but with property actually passing at death.

All of the cases last above discussed beginning with *Shukert v. Allen*, 273 U. S. 545, and ending with the *St. Louis Trust Company* cases depend basically upon the transfer of property, i.e. the shifting of economic benefits at death. That this Court's approach to estate tax problems based upon the necessity of the passage of economic benefits (save where Congress has constitutionally made something the equivalent thereof) is not to be criticized, is fairly inferable from Mr. Justice Stone's discussion in *Sanford v. Commissioner*, case No. 34, October, 1939 Term, decided November 6, 1939, where it is said:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 of the Revenue Act of 1924, 43 Stat. 253, reenacted as Section 501 of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that on transfers at death, which had long been a feature of the revenue laws. When the Gift Tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title."

Similarly in *United States v. Jacobs*, 306 U. S. 363, in discussing the inclusion of the entire value of property held under joint tenancy in Illinois where upon death of one joint tenant the other succeeds, Mr. Justice Black said, at page 368:

> "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

(c) Where the interpretation and not the constitutionality of the statute is involved, the death of the grantor may effect some change in the quality of the remainder interests without resulting in a testamentary transfer within the scope of the statute.

It is true that the obliteration by death of a possibility of reverter of the type under discussion may effect some technical or limited change in the quality of a remainder interest. In the Hallock trust, for example, the termination of the possibility had the effect of converting the remainders of the Hallock children, which prior to their father's death were vested subject to defeasance, into indefeasibly vested remainders.

It is equally true that, broadly speaking, "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed." *Corliss v. Bowers*, 281 U. S. 376, 378.

But, in *Burnet v. Wells*, 289 U. S. 670, after referring to the above quotation from *Corliss v. Bowers*, it is said at page 678 of the opinion by Mr. Justice Cardozo:

> "Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power."

The principle thus expressed is cogent in the instant case. If Section 302 (c) were amended so as expressly to tax transfers with possibilities of reverter and the constitutionality of the amendment were under attack, then the legal or equitable nature of the reversionary interests or remainders would be subordinated to the question of whether the act is so arbitrary or capricious as to amount

to confiscation. And in determining the presence or absence of these attributes the inquiry would be directed to whether the amendment has any relation to the prevention of tax avoidance and whether the death of the grantor brought into being or ripened for a survivor property rights of such character as to make appropriate the imposition of a tax upon that result. *Tyler v. United States*, 281 U. S. 497.

But where the question is merely one of interpreting language which Congress has selected and could have made as broad or as narrow as it might have desired, it is quite proper that a greater effect be given to the legal meaning of the Congressional words. The doctrine of *Corliss v. Bowers, supra,* has found its greatest expression in constitutional cases.

The proposition now under discussion is, we submit, implicit in cases decided by this Court in which the constitutionality of State or Federal laws taxing various kinds of transfers was under consideration. See *Nichols v. Coolidge*, 274 U. S. 531; *Coolidge v. Long,* 282 U. S. 582; *Saltonstall v. Saltonstall,* 276 U. S. 260; *Chase National Bank v. United States*, 278 U. S. 327; *Tyler v. United States*, 281 U. S. 497; *Porter v. Commissioner*, 288 U. S. 436; *Helvering v. Bullard,* 303 U. S. 297; *United States v. Jacobs,* 306 U. S. 363.

Taken as a group these cases imply quite strongly that transfers may be deemed to have testamentary attributes to the extent necessary to sustain the constitutionality of a statute explicitly taxing them, even though, as a matter of interpretation, they would not be considered testamentary in the absence of such an express provision.

If Congress should amend Section 302 to include transfers in which there is a possibility of reverter, these cases would unquestionably sustain the validity of such an amendment, prospectively applied. But the implication

of all of them, read in connection with cases like *Reinecke v. Northern Trust Co.* and *May v. Heiner, supra,* is that it is in the constitutional field that the reluctance of the Court to be governed by niceties and legalistic concepts finds its greatest expression. This, it is submitted, is perfectly sound in principle. Where Congress can choose the words, the taxpayer is in all fairness entitled to a liberal measure of reliance upon the legal meaning of those words.

III.

A POSSIBILITY OF REVERTER IS NOT SUCH A PROPERTY INTEREST THAT ITS OBLITERATION BY THE DEATH OF THE GRANTOR EFFECTS THAT TRANSFER OF PROPERTY OR OF ECONOMIC BENEFITS WHICH IS THE SUBJECT OF THE ESTATE TAX.

The cases above cited and discussed show that for Section 302(c) to tax a transfer there must be some real element of property or of economic benefit of property passing from the possession, enjoyment or control of the grantor at his death. It is submitted that the termination by death of a possibility of reverter does not meet that test.

Obviously the destruction of such a possibility by death is very different from the termination by death of a power of revocation or to designate beneficiaries. (*Cf. Reineke v. Northern Trust Co.,* 278 U. S. 339; *Sanford v. Commr.,* No. 34, present term, and *Rasquin v. Humphreys,* No. 37, present term.) Not only is a power of revocation a substantial incident of ownership of the property (*Chase National Bank v. United States,* 278 U. S. 327), but whether the property will revert depends solely upon the will of the grantor. The happening of the condition upon which a possibility of reverter based upon some person's death may be fulfilled becomes entirely beyond the control of the grantor the moment the conveyance is executed.

It is plain that in any realistic sense a possibility of reverter such as in the *St. Louis Trust Company* cases is not property or an estate in property, and to regard it as such would be founding a tax upon a refinement which approaches a fiction. Furthermore, the extinguishment of the possibility, while terminating any reversionary interest of the grantor and thus indirectly causing some change in the technical nature of the remainder, does not in itself transmit the grantor's retained interest or any interest to another person.

Prior to the specific amendment of Section 302(d) a remainder was not includable in the gross estate even though dependent upon the termination of a preceding life estate retained by the grantor. If in this situation the death of the grantor does not cause a shifting of the possession and enjoyment of the property to the remainderman and thus bring about a taxable transaction, *a fortiori* nothing is shifted or transmitted when a possibility of reverter comes to an end.

These views as to the true nature of a possibility of reverter are in harmony with what petitioner characterizes as technical principles of the early common law and with such expressions as there have been by the Ohio courts.[1]

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[1] In *Gilpin v. Williams*, 25 O. S. 283, 297, in which was involved the question of whether the legislature could pass an act affecting estates created before its passage, the court said:

> "There is a clear distinction between contingent estates which may vest, and vested estates which may be defeated, upon the happening of a future event. There are also other rights (so called) which do not rise to the dignity of estates at all, but are mere expectancies or possibilities, such as those of heirs apparent, possibilities of reverter, etc. It may be admitted that the legislature may control these at its pleasure; but the question before us relates to vested estates in expectancy, although subject to be divested upon the happening of an uncertain future event."

See also *Needles vs. Needles*, 7 O. S. 432; *Branch v. Cemetery Assn.*, 11 O. C. C. 185.

Assuming a case where a young wife creates a trust, the property to revert to her if she survives her elderly husband, her possibility of reverter becomes in practical effect a probability. But in most trusts the probability is against the happening of the condition upon which reverter will take place and in many the possibility is remote indeed. For example, a very usual type of transfer is where a grantor transfers property by a trust instrument giving the income to his wife for life and upon her death the principal to his three children or the survivor of them, with the proviso that if he shall survive his wife and children the property shall revert to him.[1] Here the possibility is so remote as to be almost non-existent and the imposition of a tax would be an extremely unjust ignoring of realities. But manifestly the degree of remoteness of the possibility cannot judicially be made a test of taxability.

Kindred difficulties surround the application of the judicial process to the ascertainment of the value of the possibility of reverter. The Government claims that it is the value of the remainder interest in the trust property which is to be included in the gross estate under Section 302(c), but this, it is submitted, is viewing the taxing law as a succession rather than as a transfer tax. If the tax is upon the transmission of property from the dead to the living, then it is in no sense to be measured by the value of the remainder. If there is to be any tax at all it must be on what the grantor retained. This would require an attempt to value the possibility of reverter itself.

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[1] Illustrations of trusts of this general nature are found in *Trust Company v. Field*, 10 F. Supp. 635, *Bonney v. Commissioner*, 29 B. T. A. 45, *Nichols v. Bradley*, 27 Fed. (2d) 47, *Tait v. Trust Co.*, 74 F. (2d) 851, *Wheeler v. Commissioner*, 20 B. T. A. 695, *Commissioner v. Grosse*, 100 F. (2d) 37. This list is by no means exhaustive, but only illustrative of the extreme remoteness of the possibility of reverter in many trusts.

Any actuarial formulae from which such a valuation may be arrived at would give the most artificial results. Common sense and experience tell us that ordinarily the value of a possibility of reverter depending upon a father surviving his daughter is more imaginary than real. It would seem impossible judicially to arrive at any just and satisfactory method of valuation. This difficulty does not restrict the right of Congress to amend the statute, tax the transfers and adopt some rule which it regards as appropriate for measuring the value of the reverter; but it does, we submit, inhibit the judicial construction of the general language of Section 302(c) as imposing any tax in this case.

IV.

WHETHER THE EFFECTIVE ADMINISTRATION OF THE ESTATE TAX LAW REQUIRES THE APPLICATION OF SECTION 302(c) ADVOCATED BY THE GOVERNMENT IS A MATTER FOR CONGRESSIONAL ACTION EXCLUSIVELY, AND CONGRESS HAS INDICATED ITS SATISFACTION WITH THE SECTION AS HERETOFORE CONSTRUED.

The position of the administrative branch of the Government in urging a new construction of Section 302(c) is based at least in part upon considerations of policy and expediency in the administration of the law. It is submitted that the result advocated is one to be reached, if at all, by the legislative process and not by judicial construction, especially where such construction would retrospectively overturn an established rule.

Laying aside technical questions of statutory interpretation, it is not to be presumed that Congress desires or at any time has desired that transfers subject to possibilities of reverter be taxed, or feels that they are essentially testamentary or that their taxation is necessary to prevent tax avoidance. On the contrary, the evidence points the other way.

On November 11, 1935, the day the decisions in the *St. Louis Trust Company* cases were announced, *White v. Poor*, 296 U. S. 98, was also decided. The trust involved in that case was terminable by the joint action of three trustees, of whom the decedent was originally one. She resigned as trustee, but later, upon the resignation of her successor, was reappointed under a clause in the trust instrument providing for the filling of such vacancy. It was held that the power thus acquired to participate in terminating the trust, not being in any sense a power reserved by the decedent in the trust instrument, was not a power to "alter, amend or revoke" within the meaning of Section 302 (d) of the Revenue Act of 1926.

Just as soon as possible, in Section 805 of the Revenue Act of 1936, Congress indicated its dissatisfaction with this result by amending Section 302 (d) so as to prevent the application of the decision in *White v. Poor*, the amendment being expressly made prospective in operation.[1]

It would be difficult to imagine a stronger case of legislative acquiescence in the judicial construction of a statute than this shows as to the attitude of Congress toward the

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[1] The House Committee Report on Section 805 of the Revenue Act of 1936 as contained in the original bill was in part as follows:

> "The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White v. Poor*, 296 U. S. 98. Although in that case the decedent had created a trust which was at her death subject to a power to terminate, existing in the decedent as trustee in conjunction with two other trustees, nevertheless the Supreme Court held that Section 302 (d) did not require the inclusion in the gross estate of the decedent of the property subject to such power of termination. * * * It is, therefore, provided that Section 302 (d) covers a power whether created at the time of transfer or thereafter arising from any source and whether exercisable in an individual or representative capacity."

House Committee Report on H. R. 12793, part of which was later adopted with changes in the Revenue Act of 1936.

St. Louis Trust Company decisions. Coming as they did simultaneously with the decision in *White v. Poor* and affecting the same general subject matter and the same section of the Act interpreted by the latter decision, no conclusion can be reached but that Congress had them in mind when the amendment was under consideration and was content with them.

If it should be said that there may have been insufficient time between November 11, 1935, and the passage of the Revenue Act of 1936 for the effect of the *St. Louis Trust Company* decisions to have been fully realized by Congress and desired action taken, such a suggestion would be overcome by the circumstances that three additional revenue acts have since been passed, none of which has touched Section 302(c), although one of them was avowedly for the purpose of preventing tax avoiding practices.[1]

Another striking illustration of what has been the practice when Congress has not acquiesced in decisions interpreting Section 302(c) or has felt that effective tax administration requires a different construction, is found in what happened to the section after the decisions in *May v. Heiner, Burnet v. Northern Trust Co., Morsman v. Burnet,* and *McCormick v. Burnet, supra,* which held the section inapplicable to irrevocable transfers where the grantor retains a life interest in the income. So quickly did Congress act, that the amendment of Section 302(c) to change the result of these decisions was passed, under suspension of the rules, on the day after the decisions in the three *Burnet* cases, the last day of the session: See *Hassett v. Welch,* 303 U. S. 303, 309.

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[1] Revenue Acts of 1937, 1938 and 1939. The 1937 Act was entitled—"An Act to Provide Revenue, Equalize Taxation, Prevent Tax Evasion and Avoidance and For Other Purposes." The 1938 Act contained (Sections 501-505) certain amendments of the estate and gift tax laws. The 1939 Act consists primarily of amendments to the income tax laws, although Section 403 amends the estate tax law in two minor respects.

Certainly such prompt action showed that Congress thought that transfers with a life estate reserved to the grantor were basically testamentary and ought to be reached by the estate tax law. The absence of similar action for four active Congressional years after the *St. Louis Trust Company* decisions is a strong indication of Congressional concurrence with the principle of those cases.

If it is going too far to say that such legislative acquiescence necessarily or conclusively shows express agreement with the construction of Section 302(c) heretofore made (for reasons stated *infra* we think that such explicit agreement must be considered to exist), it is at least significant as showing no feeling that the *St. Louis Trust Company* cases are any substantial hindrance to the effective administration of the estate tax law. It is easy to see why this is so. Without the amendment to Section 302(c) by the Joint Resolution of March 3, 1931, it is certain that an immense amount of property would have escaped the estate tax. Multitudes of tax conscious people would doubtless have set up trusts under which they could have continued to enjoy the income of their property, but no comparable opportunity for tax avoidance is offered by the *St. Louis Trust Company* decisions. In the great majority of cases where trust instruments create possibilities of reverter, the grantor can have no thought that he is retaining anything approximating the substance of enjoyment of the property. In the typical case the possibility is worth little or nothing and is inserted merely that every possible contingency may be covered. From its very nature it is not a highly material condition or one which, in the mind of a grantor, is related to tax avoidance.

Under date of March 18, 1937, Article 17 of Treasury Regulations 80 was amended by the addition of the following paragraph:

"On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

Article 17 as so amended not only adopts the principle of the *St. Louis Trust Company* decisions, but states quite aptly the very distinction between those cases and the *Klein* case which is now claimed to be unsound and unsatisfactory.

The amended regulation was in effect when the Internal Revenue Laws, including the Estate Tax Law, were codified by the Act of February 10, 1939. Section 302(c) was reenacted by this act, as Section 811(c). Thus, in the present year, Congress has in effect expressly adopted the construction of Section 302(c) by the *St. Louis Trust Company* cases and the Treasury Regulation following them.

In *Copper Queen Consolidated Mining Co. v. Arizona*, 206 U. S. 474, at p. 479, it was said by Mr. Justice Holmes:

"And again, when for a considerable time a statute notoriously has received the construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

Again, it is stated in the opinion in *Hassett v. Welch*, 303 U. S. 303, at p. 312:

"Not only is the legislative history of Section 803(a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought. Moreover, the reenactment of the Resolution of 1931 in the light of

the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it reenacted."

Of like effect are *Hecht v. Malley*, 265 U. S. 144; *Massachusetts Mutual Life v. United States*, 288 U. S. 269; *Murphy Oil Co. v. Burnet*, 287 U. S. 299; *Harley v. Commissioner*, 295 U. S. 216; *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1.

Granting some show of reason to the petitioner's position that he should not be prejudiced by an amendment of a regulation into which he felt he was forced by a decision of this Court,[1] the argument is of no avail when following the amendment of the regulation Congress, after four years of inaction on the subject, reenacts the cognate statute.

It is therefore submitted that the problem is within the legislative province and that under the circumstances here the disapproval of the *St. Louis Trust Company* cases would amount to a judicial amendment of Section 302(c), contrary to the actual intention which must now be ascribed to Congress with reference to the meaning of the section.

An important practical aid to the ascertainment of the real intention of Congress is found in the relation of the Gift Tax Law to the situation. It is fair to say that a transfer like those in the *St. Louis Trust Company* cases, where a grantor parts with all control over his property and where it can only revert to him on the happening of a condition beyond his power to direct, is one which a practical minded legislator would think ought to be subject to

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[1] But see *Sanford v. Commissioner*, *supra*, in which it is stated:

"A change of practice to conform to judicial decision, such as has occurred since the decision in the *Hesslein* case, or to meet administrative exigencies, will be accepted as controlling when consistent with our decisions."

the Gift Tax as a consummated gift. In *Sanford v. Commissioner*, Docket No. 34 at this term, it is said:

> "The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together." (Citing *Burnet v. Guggenheim*, 288 U. S. 280); and

> "We think, as was pointed out in the *Guggenheim* case, *supra*, 285, that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete."

If transfers like those in the *St. Louis Trust Company* cases are held to be subject to the estate tax, there should therefore be no gift tax upon them. But to hold them not taxable under the Gift Tax Law would go far beyond any of the principles so far announced in cases like *Burnet v. Guggenheim*, and *Sanford v. Commissioner, supra*, and would seem to carry possibilities of inconsistencies and confusion in the administration of the Gift Tax Law.

In any event this may present an added reason for the undoubtedly conscious action and conduct of Congress after the *St. Louis Trust Company* decisions. It may well have been in the legislative mind that if transfers such as were there involved are not taxable at death they are when executed and, having regard to the fact that transfers of this nature do not readily lend themselves to tax avoiding devices, it is a fair inference that Congress desires the law to remain as it is.

V.

THIS COURT'S DECISIONS APPLYING THE DOCTRINE OF STARE DECISIS ARE PERSUASIVE IN FAVOR OF ADHERENCE TO THE ST. LOUIS TRUST COMPANY CASES.

Assuming, *arguendo*, that the rule of the *St. Louis Trust Company* cases should no longer be approved by the Court, the question arises whether the Court shall overrule them, or shall adhere to the rule as settled, leaving it to Congress to make such change, if any, as it may deem necessary. The question involves the exercise of judicial discretion and is one upon which this Court has often spoken.

The fundamentals of the doctrine of *stare decisis* are explained in the dissenting[1] opinion of Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, at page 405:

> "*Stare decisis* is not, like the rule of *res adjudicata*, a universal, inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Hertz v. Woodman*, 218 U. S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank v. Whitney*, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial

[1] This case involved constitutional limitations. It was overruled by *Helvering v. Producers Corp.*, 303 U. S. 387.

and error, so fruitful in the physical sciences, is appropriate also in the judicial function.'"[1]

In *National Bank v. Whitney,* 103 U. S. 99, it was held that a national bank might enforce a mortgage, against the mortgagee and parties claiming under him with notice, not only as to then existing but also as to after acquired indebtedness. The Court regarded itself as bound by *National Bank v. Matthews,* 98 U. S. 621. The opinion delivered by Mr. Justice Field states, page 102:

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[1] An analysis of those cases in which this Court has departed from rules heretofore declared by it (collected by Mr. Justice Brandeis, 285 U. S. 406-409, and supplemented by later research) has resulted in no case being found by respondents in which this Court has departed from an earlier decision (not involving constitutional grounds and therefore amenable to legislative action) except in cases where there existed no possibility of harm sufficient to outweigh the desirability of a correct decision. The following cases are illustrative of the character of the legal question where the Court has felt free to overrule earlier pronouncements where nonconstitutional questions were involved.

C. E. & I. Railroad v. Industrial Commission, 284 U. S. 296 (whether a railroad employee when injured was, under the facts, to be regarded as engaged in interstate commerce under the Federal Employers Liability Act); *Lee v. C. & O. Ry.,* 260 U. S. 653, (whether a right of removal to the federal court existed when neither plaintiff nor defendant was a resident of the state); *Rosen v. U. S.,* 245 U. S. 467, (whether one convicted of forgery might testify against his codefendant); *Roberts v. Lewis,* 153 U. S. 367, (the interpretation of a particular will under local law of Nebraska); *Mason v. Eldred,* 6 Wall. 231, (the common law rule that a judgment against one joint contractor bars an action against others and merges the contract with the judgment); *Vidal v. Gerard's Executors,* 2 Howard 127, (the right of the City of Philadelphia to accept property in trust by devise); *Gazzam v. Lessee of Phillips,* 20 Howard 372, (the method of determining the quantity of land granted to a patentee under a preemption. The earlier decision was "controlled." There the court recognized the "possibility" of disturbing some rights but felt that an adherence to the earlier erroneous rule would cause more confusion); *Hornbuckle v. Toombs,* 18 Wall. 648, (whether the procedure in territorial courts was to be governed by that applicable to district and circuit courts or left to the territorial legislatures); *U. S. v. Phelps,* 107 U. S. 320, (time within which an importer may apply for appraisement of damaged goods to reduce customs duty. The court overruled the earlier decision.

"The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future."[1]

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[1] It is not essential in order to validly argue that the rule of e *St. Louis Trust Company* cases ought to be adhered to because widespread reliance thereon, that it be shown that Mr. Hallock lied upon that rule. Manifestly he did not rely on it, because his ath preceded the decision of those cases. That the considerations reliance are of a general nature and that its presence is not sential in any given case is shown by *National Bank v. Whitney*. iat case was decided at the October, 1880 term. The case by iich the Court regarded itself as bound, *National Bank v. Matews*, was decided at the October, 1878 term. The Court's asmption that national banks had conducted their business and ide loans in reliance upon the rule had chief reference therefore the period between 1878 and 1880. The mortgage loan involved the *Whitney* case, however, had been made in 1872.

(Continued from p. 42.)

d its action in so doing was *against* the revenue interests of the ited States); *Fairfield v. Gallatin County,* 100 U. S. 47, (overling an earlier decision that a county in Illinois had no power issue bonds under the Illinois constitution. A new Illinois decin had intervened favorable to the validity of the bonds. The ision sanctioned the rights of investors and did not disturb m); *Brenham v. German American Bank,* 144 U. S. 173, (the ver to issue negotiable bonds held not to be implied from power borrow money. The overruled cases were held to have been eady overruled in effect by later cases. The Court suggests sible recovery if the action not brought "directly" on the ids); *U. S. v. Nice,* 241 U. S. 591, (upholding the Congressional ver to prohibit or regulate sale of intoxicating liquor to Inns).

The view expressed in the dissent in *Burnet v. Coronado Oil & Gas Co., supra,* i.e. that which favors a quite rigid application of the rule of *stare decisis* where mere statutory construction is involved, as contrasted with a flexible approach where constitutionality is concerned and Congress can afford no remedy, is the prevailing rule. Thus in *Erie R. Co. v. Tompkins,* 304 U. S. 64, in which the doctrine of *Swift v. Tyson,* 16 Peters 1, namely, that insofar as general law is concerned, federal courts will apply their own common law, was held unconstitutional and overruled, the majority opinion states, p. 77:

> "The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. *If only a question of statutory construction were involved, we should not be prepared to abandon the doctrine so widely applied throughout nearly a century.* But the unconstitutionality of the course pursued has now been made clear and compels us to do so." (Counsel's emphasis.)

In *Boston Store v. American Gramaphone Co.,* 246 U. S. 8, deciding that stipulations in a contract of sale of a patented article fixing the price on resale are void under the general law and not within the monopoly conferred or the remedies afforded by the patent law, the majority leaned heavily upon certain earlier decisions. Although apparently in doubt as to their soundness Mr. Justice Brandeis concurred in a separate opinion, saying at p. 28:

> "I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been appealed to."

the views of Mr. Justice Sutherland, concurred in by . Justice McReynolds and Mr. Justice Butler, in the dis- t in *United States v. Raynor*, 302 U. S. 540, at p. 552.

The Nature of Judicial Process (Cardozo) states at ge 146:

"I say, therefore, that in the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared. I think it is significant that when the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld."

And on p. 149 we find:

"I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

is latter consideration is important. Granted that the se division of the Court in the *St. Louis Trust Company* es indicates sharp conflict in judicial thought, the an- incement of another rule might be similarly conditioned. t inevitably, but very possibly, the Court a few brief rs hence might again be besought for reconsideration.

In speaking of the wisdom of rules which lead to cer- nty and repose in our judicial system, Judge Robert von schzisker in *XXXVII Harvard Law Review*, page 409, is article entitled "Stare Decisis in Courts of Last Re- t," said on page 413:

"For the purpose of keeping the law standardized so it may be knowable to all, the doctrine of *stare decisis* dictates that decisions formally reduced to judg-

ment shall thereafter be followed as precedents; that is to say, the law of such decisions,—even though thought to be wrong in principle or to have been incorrectly applied,—shall not be departed from in subsequent cases where a departure is apt to do more harm than would occur should the decision be allowed to stand until the legislature might see fit to change the rules of conduct there laid down or acted upon. But if, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration."

The question here before the Court is one of statutory construction and involves no question of constitutionality. As in *National Bank v. Whitney*, 103 U. S. 99, this Court may take account of the fact that many business transactions have been entered into upon the strength of the decisions which it is now sought to have this Court overrule. That the rule crystallized in its final form but four years ago is not important, because it must be the frequency, character and size of transactions entered into rather than the number of calendar years involved which determine whether a rule of law has become so far entrenched as to warrant its retention until Congress shall act.

We are dealing not with a single decision but with a true series of decisions. The cases preceding the *St. Louis Trust Company* cases and which are akin in principle are set out at pages 19 to 21, *supra*. Some of the cases following and approving the *St. Louis Trust Company* cases are the following: *Bingham v. U. S.*, 296 U. S. 211; *Commissioner v. Grosse*, 100 F. (2d) 37; *Commissioner v. Kaplan*, 102 F. (2d) 329; *Rothensies v. Cassell*, 103 F. (2d) 834 (argued herewith); *Corning v. Commissioner*, 104 F. (2d) 329; *Blakeslee v. Smith*, 26 F. Supp. 28 (semble); *Bailey*

v. U. S., 27 F. Sup. 617, (semble); *Nicholson v. U. S.*, 25 F. Sup. 424; *Commissioner v. Brooks*, 87 F. (2d) 1000-3; *Mackay v. Commissioner*, 94 F. (2d) 558; *Old Colony Trust Co. v. U. S.*, 15 F. Sup. 417, 422-3; *Myers v. Magruder*, 15 F. Sup. 488, 493; *U. S. v. Nichols*, 92 F. (2d) 704; *Kneeland*, 34 B. T. A. 816; *John T. H. Mitchell* 37 B. T. A. 1, 8; *Waldo C. Bryant*, 36 B. T. A. 669, 676.

Congress has power to amend Section 302(c).

That Congress may correct the situation if a change in the law be advisable is clear. In fact Congress only can adequately do so. This is because the Congressional desire may be either (a) to keep the law as it is or (b) to tax all transfers otherwise taxable even though there remains to the transferor nothing more than a possibility of reverter, or (c) to tax certain transfers of the character last above described but not all. In this latter connection it is pointed out that transfers completed and vested containing possibilities of reverter may be of many differing types, some of which Congress may desire to tax and some not. This is because the possibility of reverter has in some cases a substantial value and in some no real value whatever.[1]

It cannot be that Congress intended that all such cases were to be taxed, but, if the rule of the *St. Louis Trust Company* cases is to be abandoned, inevitably all come within the ambit of taxation. The judicial process cannot draw a rigid line of demarcation. The legislative process can draw the line of taxability rigidly wherever it may in its wisdom choose. Congress might make taxability depend upon the

[1] It is only a partial answer to this argument that the carving out of the various life estates would radically reduce the value of the remainder. No matter to what point the value of the remainder is reduced there would remain a tax on a possibility which, viewed practically, is of no value whatever.

number of lives whose predecease must occur before the reverter takes place or upon the ages of the beneficiaries in relation to that of the donor or upon any other criterion of probability that the reverter will take place; or Congress might be contented to leave the law as this Court four years ago declared it to be. All of these considerations argue for leaving to Congress a delicate matter much more properly of legislative than of judicial significance.

Petitioner states, page 28 of his brief, "The problem is one which cannot readily be dealt with by amendatory legislation. It would be unsatisfactory, if not almost impossible, to attempt to describe in the statute the numerous limitations of estates by which transfers are made to take effect in possession or enjoyment at or after the death of the grantor." We submit that the argument is utterly without merit. Passing the unsupported assumption that Congress desires to deal with the problem by amendatory legislation, we point out that mere difficulty, short of impossibility, in arriving at a solution does not call for a relaxation of the settled rules of law which guide this Court in determining whether to adhere to an earlier determination. But no real difficulty exists. If Congress should desire to tax all transfers in which there exists a possibility of reverter, Congress may do so quite simply. All that is required is an additional sentence in Section 302(c) stating in appropriate language that if a transfer is otherwise taxable under that section, the fact that the transferor may have retained a possibility of reverter shall not render the transfer nontaxable; or perhaps that in enforcing the section no distinction shall be drawn between vested interests transferred subject to divestiture by condition subsequent and contingent interests to come into being upon condition precedent; or that a retention by the transferor of any reversionary interest, however denominated, shall require inclusion in the gross estate. To be realistic about it, if the *St. Louis Trust Company* cases had been decided

differently the Commissioner would have had no trouble in laying down clear regulations sufficient to enable him to collect his taxes.

Congress may very well decide to keep the law as declared in the *St. Louis Trust Company* cases. Whether in that respect Congress is acting wisely is for Congress to determine. It is not essential that reasons be ascribed for the contentment of Congress. One possible reason however is apparent. As heretofore pointed out Congress may well have reasoned that adequate revenue will be produced through gift taxation and that estate taxation related to the same subject is not important.

It is submitted that the conclusion that Congress intends the law to remain as it is is inevitable. As shown above, four times since the decision of the *St. Louis Trust Company* cases Congress has enacted revenue legislation. The 1937 Act was specifically intended to prevent tax avoidance and would have covered transfers with possibilities of reverter had Congress thought they were being used to avoid taxes.

These conclusions as to Congressional intent are fortified by the fact that as heretofore shown Congress has never been unwilling promptly to produce amendatory legislation whenever it has felt it required by decisions of this Court. Such considerations, as well as the recodification in 1939 of the Revenue Laws, are, we submit, cogent factors to be considered in connection with the wisdom of applying the rule of *stare decisis.*

Petitioner makes the sweeping assertion that the decisions of this Court have substantially deprived Section 302 (c) of all substance, but his own brief demonstrates that to the extent that Congress has regarded this Court's decisions construing Section 302 as impairing the efficacy of that section and kindred sections, it has easily remedied the situation at once by amendment. Thus the statute is by no means without substance.

As the entire Section 302 now stands, where a transfer is otherwise complete and irrevocable but the donor retains some real incident of ownership or property which is thought to be properly taxable the matter is specifically covered by various subsections.

The general language of Section 302 (c) covering transfers intended to take effect in possession or enjoyment at or after death is intended for the sole purpose of reaching transfers where the grantor has in some way retained in himself during his life the use, benefit or control of the property, i.e., transfers where the gift remains ambulatory during the life of the donor in the sense of being subject to recall or other disposition at his will. A typical example of such transfers is the conditional delivery of an unrecorded deed not to be delivered to the grantee until the grantor's death. Other typical cases are shown in the footnote.[1] Congress can add to them if it be wise.

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[1] The following cases, in most of which the *Klein* case was cited, furnish a few examples of transfers held to be taxable as intended to take effect at death: *Commissioner v. Schwarz,* 74 Fed. (2d) 712 (where income was payable to grantor if living at his sister's death; otherwise to the grantor's descendants); *Union Trust Company v. U. S.,* 54 Fed. (2d) 152 (Court of Claims (where decedent delivered stock endorsed in blank to a bank as trustee under an agreement that it should be held for the joint lives of himself and wife and upon the death of one should be delivered to the survivor, the decedent having the right to the income meanwhile); *Bryant v. Commissioner,* 36 B. T. A. 669 (where property was transferred to a trustee under agreement for payment of income to the decedent's wife for life, then to decedent for life, the principal to be paid to the decedent's estate upon the death of the survivor); *Jaeger v. Commissioner,* 33 B. T. A. 989 (where decedent endorsed stock certificates to his several children and delivered them to a son with a statement that he could have them transferred and delivered to the donees whenever he saw fit and dividends were received by the decedent until his death); *Trust Company v. Commissioner,* 27 B. T. A. 972 (where trust agreement made net income payable to decedent's two daughters for life and upon their respective deaths the corpus was to be paid to decedent if living and if not to such persons as he might appoint by will).

Another strong intendment in favor of applying the rule of *stare decisis* arises by analogy from the rule that where doubts exist in respect of the interpretation of a tax statute they should be resolved in favor of the taxpayer. To be sure the rule is by no means inexorable and attempts of taxpayers to use it as a sword rather than a shield have been rejected by the Court. Nevertheless the doctrine, when based upon a real doubt, seems fundamentally sound. If doubts of the character stated shall be resolved in favor of the taxpayer when the highest court in the land has not spoken, they should, we submit, ' e resolved in favor of the taxpayer when the highest court in the land has authoritatively spoken and is being asked to change its view rather than await the action of the legislative branch.

It is submitted, both upon principle and authority, that the Court's judicial discretion should be exercised in favor of not overruling the *St. Louis Trust Company* cases even though the Court should think that they ought not to have been decided as they were.

Respectfully submitted,

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